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No. 85-504 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUNDAY-THAGARD COMPANY,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

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BRIEF FOR AMICUS CURIAE LAKETON ASPHALT REFINING, INC.

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QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals, in disregard of this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983), could bar a citizen's suit for return of money that the Department of the Interior has unlawfully exacted, on the grounds that the United States has not waived sovereign immunity for such suit.

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BRIEF FOR AMICUS CURIAE LAKETON ASPHALT REFINING, INC.

INTEREST OF AMICUS CURIAE

Laketon Asphalt Refining, Inc. ("Laketon"), as amicus curiae, hereby files its brief in support of the Petition for a Writ of Certiorari filed by Lunday-Thagard Company ("Lunday-Thagard" or "Petitioner"). Lunday-Thagard has brought an action, as have many other small crude oil refiners, including Laketon,[1] to recover massive crude oil

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[1] *See* Laketon Asphalt Refining, Inc. v. United States Department of the Interior, No. EV-81-162-C (S.D. Ind. filed Aug. 7, 1981).

overcharges that the Department of the Interior ("DOI") exacted and retained in willful, knowing violation of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 753 (1982), and of the Mandatory Petroleum Price Regulations ("Price Regulations"), 10 C.F.R. Part 212, that were administered by the Department of Energy ("DOE") and its predecessor agencies, under the authority of the EPAA.[2] By judgment entered on July 26, 1985, the Temporary Emergency Court of Appeals ("TECA") held that Lunday-Thagard was barred by the doctrine of sovereign immunity from seeking redress for such knowing and willful violations. *Lunday-Thagard Co. v. United States Department of the Interior*, No. 5-115 (Temp. Emer. Ct. App. July 16, 1985), *reprinted in* Petitioner's Appendix A at 1a ("Pet. App.").[3]

Laketon's similar pending action is in danger of being dismissed unless the *Lunday-Thagard* decision is reversed. Indeed, on August 16, 1985, the DOI filed a Motion To Stay consideration of Laketon's Motion for Partial Summary Judgment pending the court's resolution of the DOI's Motion To Dismiss, citing TECA's decision in Lunday-Thagard in support of its contention that Laketon's claims are barred by sovereign immunity. *See* Defendants' Motion To Stay, Appendix to Brief for Amicus Curiae Laketon Asphalt Refining, Inc.

Lunday-Thagard has petitioned this Court to review TECA's July 26, 1985 judgment. Laketon supports Lunday--

[2]All references in this Brief to the Department of Energy should be understood to include its predecessor agencies, the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration ("FEA").

[3]Statutory suits for redress, as opposed to common law suits for the refund of unlawful overcharges, are authorized under Section 210 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note (1976).

Thagard's petition and respectfully requests that a writ of certiorari be issued.

SUMMARY OF ARGUMENT

TECA's ruling that Lunday-Thagard's action is barred is contrary to law and is inconsistent with decisions of this Court. The Tucker Act waives sovereign immunity for Lunday-Thagard's common law cause of action for refund of money unlawfully exacted. In addition, Lunday-Thagard has separate and distinct statutory causes of action against the government for violations of the crude oil pricing regulations.

ARGUMENT

Without discussing the voluminous documentary evidence that DOI knowingly and willfully violated DOE's crude oil price and certification regulation and thus wrongfully exacted money from purchasers of crude oil from DOI,[4]

[4]A few of the relevant documents obtained pursuant to requests under the Freedom of Information Act have been compiled in the Appendix filed in connection with the Brief for Amici Curiae Howell Corporation, *et al.* In addition, two of the documents which appear in the Howell Appendix were obtained through discovery and marked as trial exhibits in Plateau, Inc. v. United States Dep't of Interior, No. 82-0501 (D. Wyo.) (dismissed upon settlement May 30, 1984). *Plateau*, as well as a number of other overcharge cases, were settled by the DOI prior to trial, generally after denial of the DOI's Motion To Dismiss on sovereign immunity grounds. *See, e.g*, Young Refining Corp. v. United States Dep't of Interior, No. 82-2048 (E.D. La.) (dismissed upon settlement Aug. 2, 1983); Wyoming Refining Co. v. Dep't of Interior, No. C81-0376B (D. Wyo.) (dismissed upon settlement Nov. 13, 1982); Sabre Refining Co. v. Andrus, No. H-80-59 (S.D. Tex.)(dismissed upon settlement Jan. 8, 1981); Young Refining Corp. v. United States Dep't of Interior, No. 78-1470 (D.D.C.)(dismissed upon settlement Dec. 12, 1978); *see also* Glenrock Refinery, Inc. v. United States Dep't of Interior, No. C84-0264B (D. Wyo. Dec. 5, 1984). For a thorough discussion of the history of DOI's disregard of the federal petroleum price controls, see Brief for Amici Curiae Howell Corporation, *et al.* at 8-13.

TECA ruled that redress for DOI's violations could not be sought because the United States did not waive sovereign immunity for actions under Section 210 of the ESA. At the same time, however, TECA acknowledged that

> Plaintiff presents a claim of injury which on its face appears to call for a remedy. However, we are dealing with a statute which does not afford a remedy, and the plaintiff must look to Congress for relief.

Lunday-Thagard, slip op. at 8, *reprinted in* Pet. App. at 8a.

TECA's ruling that Lunday-Thagard's action is barred ignores both the common law and recent decisions of this Court. The United States has waived sovereign immunity from this action not once, which is all that is required, but at least three times.

I. TECA Erroneously Held That The United States Did Not Waive Sovereign Immunity For Lunday-Thagard's Common Law Action To Recover Money Wrongfully Exacted And Retained By The DOI.

A. Lunday-Thagard has a common law cause of action for return of money the DOI wrongfully exacted, for which sovereign immunity has been waived.

Lunday-Thagard's cause of action is grounded upon the common law right to recover money wrongfully exacted or retained. *See Bank of the United States v. Bank of Washington*, 30 U.S. (6 Pet.) 8 (1832). This Court described this right of action as follows:

> Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it.

Id. at 19. Claims for refund of money wrongfully exacted are actionable against the United States government by operation of the waiver of federal sovereign immunity set forth in

the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1982), which provides for a right of action against the sovereign as to

> any claim against the United States founded either upon *the Constitution* or *any act of Congress* or *any regulation of an executive department* or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id. § 1491 (emphasis added); *see also id.* § 1346(a)(2). The applicability of that waiver of immunity to the common law cause of action for unlawful exaction has been consistently and emphatically confirmed by this and other courts. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Testan*, 424 U.S. 392, 402 (1976); *Carriso, Inc. v. United States*, 106 F.2d 707, 712 (9th Cir. 1939); *Eastport S.S. Corp v. United States*, 372 F.2d 1002 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Eastport S.S. Corp. v. United States*, 157 Ct. Cl. 802, 804 (1962); *Seatrade Corp. v. United States*, 285 F.2d 448 (Ct. Cl. 1961); *Clapp v. United States*, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954).

In the most recent of these decisions, *United States v. Mitchell* ("*Mitchell II*"), this Court specifically noted that the government had not even bothered to contest the plaintiffs' right to sue for the refund of excessive or improper exactions. The Court quoted the Court of Claims' conclusion that "there is undoubted consent-to-suit from such claims that the government illegally kept some of the [plaintiffs'] own money or property". 463 U.S. at 222 n.23.[5] This holding

[5]In its decision TECA held that, because the ESA places jurisdiction of EPAA claims in the District Courts and not in the Court of Claims, Lunday-Thagard's claim does not fall within the Tucker Act.

is consistent with this Court's decision in its first consideration of *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535 (1980), in which the Court recognized that even without an explicit statutory waiver of sovereign immunity for money damages, an action still could be "cognizable under the Tucker Act because it involves money improperly exacted or retained." *Id.* at 546 n.7.

Mitchell II thus confirms the conclusion set forth in *Eastport Steamship Corporation v. United States* and emphasized in *United States v. Testan* that sovereign immunity from claims such as the instant one for the return of money paid to the government is categorically waived by the Tucker Act, regardless of whether the claimant also asserts a separate statutory cause of action. *See Eastport S.S. Corp.*, 372 F.2d at 1007 (expressly distinguishing between actions for return of money wrongfully exacted that citizens have already paid to government and damage actions seeking compensation where no money has been paid); *Testan*, 424 U.S. at 402 (same,; *see also Neely v. United States*, 554 F.2d 114 (3d Cir. 1977); *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979); *Chambers v. United States*, 451 F.2d 1045 (Ct. Cl. 1971).

When a refund is sought, rather than damages, however, it is insignificant which particular statute has been violated by the government. The important fact, for purposes of the waiver of sovereign immunity, is that the overcharge was illegal at the time it was received. Likewise, as demonstrated by both *Mitchell I* and *II*, it is irrelevant whether the particular statutory scheme violated also contains a separate damage remedy and waiver: the common law cause of action for refund exists independent of any separate damage remedy or waiver. *See Mitchell II*, 463 U.S. at 222 n.23 (quoting Mitchell v. United States, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983)).

Lunday-Thagard, like Laketon, has claimed, and if given the opportunity, will prove, that the government exacted overcharges in sales of crude oil to a small refiner in violation of the EPAA and Price Regulations. Nothing more is required.

B. Lunday-Thagard need not identify an additional statutory waiver of immunity.

Although TECA considered it significant that no express waiver of sovereign immunity is contained in Section 210 of the ESA, *Lunday-Thagard*, slip op. at 4, *reprinted in* Pet. App. at 4a, in fact Lunday-Thagard needs no such waiver. Although both Section 210 of the ESA and Section 23 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1982), do, in fact, create statutory causes of action against the DOI in suits such as Lunday-Thagard's, the existence or nonexistence of a waiver of sovereign immunity in those statutes is totally irrelevant to Lunday-Thagard's common law cause of action for illegal exaction and retention of money by virtue of its violations of the EPAA and Price Regulations. This cause of action constitutes a claim "founded on an act of Congress" (the EPAA) or "regulation of an executive department" (the DOE Price Regulations) for which the Tucker Act waives governmental immunity.[6] It represents a classic example of the situation

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[6]The limitation statute applicable to actions against the government under the Tucker Act waiver of sovereign immunity is 28 U.S.C. § 2401(a). Section 2401(a) is a revision of the prior Tucker Act limitation provision adopted by Congress in 1948. 62 Stat. 971; *see* United States v. Glenn, 231 F.2d 884, 886 (9th Cir. 1956). By separately placing and repromulgating § 2401(a), Congress emphasized that this general limitations statute is intended to be applicable to "*every civil action*" against the United States unless Congress, in a separate federal statute governing a specific type of action, has

described in *Eastport Steamship Corporation* and denounced by the court in *Clapp v. United States* in which "the Government has the citizen's money in its pocket, and pleads the illegal acts of its officials as an excuse for keeping it there." *Eastport S.S. Corp.*, 372 F.2d at 1008; *Clapp*, 117 F. Supp. at 580.

To require Lunday-Thagard to identify an additional waiver of immunity for its improper exaction claim besides that contained in the Tucker Act would be in direct conflict with the express holdings of *Mitchell II* and the numerous other cases that address the issue of the independence of the Tucker Act waiver of immunity for wrongful exaction claims against the government. *See, e.g., Mitchell II*, 463 U.S. 206; *Testan*, 424 U.S. 643; *Neely*, 554 F.2d 114; *Aycock-Lindsay Corp. v. United States*, 171 F.2d 518, 520-21 (5th Cir. 1948); *Eastport S.S. Corp.*, 372 F.2d 1002; *South Puerto Rico Sugar Co. Trading Corp.*, 334 F.2d 622; *Suwanee S.S. Co. v. United States*, 279 F.2d 874 (Ct. Cl. 1960); *see also Davis*, 490 F.2d 1360; *Sanders*, 594 F.2d 804; *Chambers*, 451 F.2d 1045.

II. In Addition To Its Common Law Cause of Action, Lunday-Thagard Has Separate And Distinct Statutory Causes Of Action That Fairly Mandate Compensation Against The Government For Injuries Caused By Its Violation Of Crude Oil Pricing Regulations.

In enacting the EPAA, Congress incorporated Sections 210 and 211 of the ESA. *See* 15 U.S.C. § 754 (1982); 12

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explicitly designated a shorter or longer limitations period. *See* Menkarell v. Bureau of Narcotics, 463 F.2d 88, 91 (3rd Cir. 1972); Eastern Freight Ways, Inc. v. United States, 257 F.2d 703, 705 (2d Cir. 1958); Carriso, Inc. v. United States, 106 F.2d 707 (9th Cir. 1939); *see also* Poindexter v. United States, 647 F.2d 34, 37 (9th Cir. 1981) (by federal statute of limitations, Congress decided to allow suits against United States that might be barred against private defendant by shorter state limitations period, and to cut off suits that might be allowed against private defendant by longer state limitations period); Young v. United States, 184 F.2d 587 (D.C. Cir. 1950).

U.S.C. § 1904 note (1976). Section 210 of the ESA creates a federal cause of action for "any person suffering a legal wrong because of any act or practice arising out of [the Price Regulations]." Such a suit may be brought without regard to the amount in controversy, and may request compensatory, declaratory or injunctive relief.[7]

This Court's decision in *Mitchell II* holds that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear." 463 U.S. at 218. Lunday-Thagard, which suffered a legal wrong from the DOI's violation of the Price Regulations, thus has a substantive right to recovery for which the existence of a waiver of sovereign immunity is clear. That such relief is made equally available when the illegal "act or practice" was committed by a government agency is obvious from the statutory framework and legislative history of the Act.

The language of Section 210 is properly interpreted to mandate compensation against the United States in Lunday- Thagard's action because the EPAA and its implementing regulations expressly apply to sales of crude oil by all

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[7]Congress also provided a right of action for aggrieved purchasers of off-shore royalty oil from the DOI in the 1978 Amendment to the OCSLA. In § 27 of the Act Congress authorized the DOI to sell such royalty oil "for not more than its regulated price . . .". 43 U.S.C. § 1353(b)(1) (1982). In § 23 Congress ensured that "any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States . . . for any alleged violation of any provision of this subchapter . . .". *Id.* § 1349(a)(1). Further, the Act states "[n]othing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief." *Id.* § 1349 (a)(6).

sellers, including federal, state and local governments. *See* EPAA §§ 4(a) ("regulation *shall apply to all crude oil* . . . produced in or imported into the United States"), 5 (ESA § 210 *"shall apply to the regulation promulgated under section 753(a)"*), 15 U.S.C. §§ 753(a), 754(a)(1) (1982) (emphasis added). Accordingly, the literal terms of the ESA and EPAA provide that a Section 210 action will lie for overcharges in *all sales of crude oil.* In accordance with this statutory mandate to subject all sales of crude oil to regulation, the DOE's regulations provided at 10 C.F.R. § 212.52 as follows:

> The prices charged for any sale of a covered product *by any Federal department, agency or other instrumentality*, including any wholly owned Government corporation . . . and by State and local governments *are subject to the price regulations of this part.* . . .

10 C.F.R. § 212.52 (1981) (emphasis added).

The applicability of the Price Regulations to the federal government, including the DOI, has been repeatedly affirmed in the public pronouncements of Congress and of the DOE[8] and in the decisions of TECA.[9] "To exempt one of the largest sellers of crude oil from the pricing mechanism precluding purchasers from pursuing their statutory remedies for overcharges would be incongruent with [Con-

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[8]*See, e.g.*, Interpretation No. 1975-15, [Compliance Manual] Energy Mgmt. (CCH) ¶ 52,256, at 56,281 (Mar. 20, 1975) ("the Mandatory Petroleum Price Regulations apply uniformly to Federal, State and local governments"); Ruling 1974-22, 3 Energy Mgmt. (CCH) ¶ 16,032 (July 9, 1974); *see also* United States Geological Survey, 5 FEA Energy Mgmt. (CCH) ¶ 80,537, at 80,676-77 (Jan. 26, 1977).

[9]*See* Mohawk Petroleum Corp. v. Department of the Navy, 521 F.2d 1394 (Temp. Emer. Ct. App. 1975) (holding that FEA had statutory authority to regulate sale of crude oil by federal agencies).

gress'] regulatory scheme". *Wyoming Refining Co. v. Department of the Interior*, 547 F. Supp. 297, 300 (D. Wyo. 1982).

CONCLUSION

For the foregoing reasons, Lunday-Thagard's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 22, 1985

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Civil Action No. EV-81-162-C

LAKETON ASPHALT REFINING, INC.,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants.

DEFENDANTS' MOTION TO STAY

Defendants United States Department of the Interior and Donald P. Hodel, Secretary of the Interior, by their undersigned counsel, hereby move to stay plaintiff Laketon Asphalt Refining Inc.'s motion for partial summary judgment pending this Court's resolution of defendants' motion to dismiss. The motion to dismiss argued that claims such as those asserted by plaintiff in its motion for partial summary judgment are barred by sovereign immunity, a position recently affirmed by the Temporary Emergency Court of Appeals in *Lunday-Thagard* v. *DOI*, No. 5-115 (July 26, 1985). Accordingly, this Court is without jurisdiction to rule on plaintiff's motion for partial summary judgment.

Defendants respectfully refer the court to the attached memorandum for a full statement of the grounds for this motion.

Respectfully submitted,

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traces the accounting and reporting procedures used by the Survey and concludes at page 21 that under existing procedures, Survey cannot comply with the regulations:

> The report (on upper tier and lower tier oil) is only as accurate as the lessee's figures upon which it is essentially based. These figures reflecting volumes, sale prices, and royalty values of production, are subject to and frequently are corrected by the lessee or by the USGS pursuant to an audit months after delivery of the royalty oil. The Secretary cannot certify in good faith that these are the correct figures; rather, he can only report the best figures he has at the time. This is also why the USGS cannot comply with FEA regulations establishing the 69-day period from the month of production as the date beyond which the Secretary may not collect additional royalty due the United States.

The memorandum, however, also concludes that as an alternative, the Secretary could honor the regulations if the estimated billings to refiners were increased to insure that refiners would never underpay. Under this approach, if the final corrected figures indicated overpayments had been made, refunds could be made to the refiners. It would appear that the existence of this alternative effectively negates the argument that compliance will result in the loss of royalty and thus circumscribe the Secretary's duty. If, however, it was determined that a refiner was entitled to bring suit under § 210 of the Economic Stabilization Act, as incorporated in § 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754, it is possible that the United States could be held liable for treble damages for intentionally overcharging the refiner. I view this possibility as remote because it has been held in *McCulloch Gas Processing Corporation v.* [*Cancian*] *Hidrogas Resources*, 577 F.2d 712 (TECA 1978) *cert.den.* 439 U.S. 831 (1978) that § 210 does not provide a right of action against the

Government. [A significant] alternative not discussed by the memorandum is whether existing Survey procedures used to verify the lessee's figures could be modified in order to comply with certification requirements. In short, the memorandum does not illustrate that compliance with the regulations is impossible nor that compliance will result in circumvention of the Secretary's statutory duty to collect royalty.

Second, the memorandum states that the Secretary's duty can only be circumscribed by statute and appears to conclude that even if DOE had such authority, it would make no difference. The language at page 22 of the opinion reads:

> Even if the FEA [DOE] had the authority, the FEA [DOE] regulations in this regard are clearly unreasonable and arbitrary as to the United States.

As previously indicated, it is my view that it has not been shown that the regulations circumscribe the Secretary's duty. If it is assumed, however, that the regulations did in fact prevent the Secretary from exercising his duties, the above statement is still questionable. If DOE had clear statutory authority to [alter] the Secretary's duties, the regulations promulgated under this authority would have to be followed. The above statement, however, takes the position that if the regulations are "unreasonable and arbitrary as to the United States" DOE authority is irrelevant. This position infers that the sole test of whether an agency is required to comply with another agency's regulations is whether such regulations are unreasonable and arbitrary. Such inference is not an accurate statement of the law and is not legally supportable. The general rule of statutory construction is that "where there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden*, 308 U.S. 188, 198 (1939). This rule is applicable in this case. While the memorandum illus-

trates that compliance with DOE certification regulations will cause administrative hardship, it does not contain adequate legal or factual justification to show that both DOI and DOE statutory authority cannot be given effect.

Finally, it should be noted that the most recent legislation relating to the question of certification indicates that DOI was required to comply with certification regulations. Section 27(b)(2) of the OCS Lands Act Amendments of 1978, 43 U.S.C. § 1353(b)(2) reads in relevant part:

> (2) Whenever, after consultation with the Secretary of Energy, the Secretary determines that small refiners do not have access to adequate supplies of oil at equitable prices, the Secretary may dispose of any oil which is taken as a royalty to new profit share accruing or reserved to the United States pursuant to any lease issued or maintained under this Act or purchased by the United States pursuant to subsection (a)(2) of this section, by conducting a lottery for the sale of such oil, *or may equitably allocate such oil among the competitors for purchase of such oil, at the regulated price,* or if no regulated price applies, at its fair market value. [Emphasis added].

The term "regulated price" is defined in section 27(e)(1)(A) as the highest price "at which oil [many] [sic] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 and *any rule or order issued under such Act.*" [Emphasis added]. The certification regulations in question were issued under the Emergency Petroleum Allocation Act of 1973, as amended, and it is my view that the Secretary was required to comply with such regulations in the sale of OCS royalty oil to refiners. It can be argued that this statute illustrates that DOI was not required to comply with certification regulations

prior to its enactment. A better view, however, is that it confirms the previously existing intent that DOI comply with certification regulations issued under authority of the Emergency Petroleum Allocation Act of 1973.

In summary, the conclusion of the Solicitor's Memorandum of October 21, 1977 that DOI is not required to comply with DOE certification regulations is not legally supportable. The legal authority of DOI to assess a one-half percent administration charge and to assess royalty on the total price received by producers given DOE price relief is adequately supported by the memorandum.

John E. Kelly
Staff Attorney

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

January 2, 1980

Memorandum

To: Larry McBride
Ken Lee

From: John Leshy

Subject: DOE/USGS Pricing Dispute

Bart Eisenberg, who is in charge of the Enforcement Division at DOE's Economic Regulatory Administration (tele. 254-8740) called me on December 31 to press for a resolution ASAP on the USGS/DOI oil pricing dispute. He says that events are transpiring which means we cannot sit on this issue much longer. DOE is now bringing criminal charges against certain private oil companies for violating DOE's pricing regulations, and the companies are asserting as a defense USGS's pricing behavior. He says, quite reasonably, that the federal government is going to look absolutely terrible and DOE's prosecutions of flagrant behavior by private individuals is going to be hampered by the failure to resolve this issue. USGS and DOE both may well end up with a serious black eye if the situation is not resolved soon.

His view of the merits is that there is no reason why USGS prices should be different from what DOE requires of everyone else. I told him I would call him back Wednesday with a status report on our examination of this issue.

Please advise me by noon on Wednesday what is being done as a follow-up to our meeting of a couple of months ago with the DOE people, and how we can resolve it ASAP.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

7 SEP 1978

EAS:DGL:GLG
106-18-57-723

Honorable Barbara Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Ms. Babcock:

RE: *Mountain Fuel Supply Co. v. U.S. Department of Energy, et al.*, Civil No. 78-0198 (D. Utah)

This is to confirm our oral advice in the above-captioned case that defendants Andrus and the Geological Survey are willing to refund the overcharges the Department of Energy found to have occurred in the sale of oil produced on plaintiff's federal leases in the Dry Piney Field.

Interior Department defendants will make the refunds to the purchasers of the oil from Geological Survey under the royalty oil contracts, Sage Creek and Mountaineer Refineries. With these refunds made, the portion of the DOE order directing plaintiff to refund $44,814.62 to these refineries will become moot, the second and third causes of action in the complaint will become moot, and the case against Interior defendants should be dismissed.

With this accomplished, the potential divergence in views between the two cabinet agencies over the appropriateness of DOE's ordering plaintiff to refund monies for

overcharges on oil plaintiff never owned or sold becomes irrelevant to the case.

Our Regional Solicitor in Salt Lake City will be able to provide you with an affidavit or other evidence from Geological Survey of the refunds to Sage Creek and Mountaineer after those refunds are made. In fact, the "refunds" will probably be made in the form of deductions from current payments due on the royalty oil contracts—no cash need be transferred.

Geological Survey informs us, as the Regional Solicitor indicated in his litigation report, that it has no reason to contest the DOE pricing determination with respect to the value of the federal share of the oil produced from the Dry Piney Field. We conclude that even if the plaintiff's challenge to the DOE pricing determination succeeds, the *lease* contract will not be violated in any way, since the United States elected to receive its royalty in kind rather than in value, and it did receive its royalty percentage in kind, no matter what the lawful value of the production is finally determined to be.

Finally, under Article V of the royalty oil contracts themselves, the price at which the federal oil is sold to the refineries is "the market price," which is tied to the posted price for the field or the value received by the federal lessees for the sale of their share of the production. Thus, the royalty oil refineries would be obligated to repay the refunded amounts should plaintiff prevail in this case and the posted price be established as the lawful "market price" of this production. This fact does not, in our view, jeopardize your defense of DOI's determination, and it is of no relevance to plaintiff's argument. Further, it is not inconsistent with the DOI proceedings, in which Interior was not a party, and DOE's order, which did not run against the United States (as lessor) or Geological Survey as seller of the royalty oil.

We hope these positions will clear the way for dismissal of Interior defendants and the unencumbered defense of the DOE pricing determination.

Sincerely yours

FREDERICK N. FERGUSON
Frederick N. Ferguson
Deputy Solicitor

cc:
Thomas Patton, Esq.
Office of the General Counsel
Department of Energy
12th & Pennsylvania Ave., N.W.
Washington, D.C. 20461
Director, U.S. Geological Survey
Regional Solicitor, Salt Lake City
Attn.: Roland Robison, Esq.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

OCT 30 1978

Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Ms. Babcock:

This is to confirm the recommendation of the Department of the Interior on your Department's proposal to initiate settlement negotiations with the plaintiff in the action entitled *Young Refining Corporation v. U.S. Department of the Interior, et al.*, Civil No. 78-1470, in the United States District Court for the District of Columbia. Our position on the settlement proposal was given (by telephone) by Mr. Lawrence R. Boese, Office of the Solicitor, to Ms. Stephanie L. Golden, of your office, on October 26, 1978.

The bases of initiating settlement negotiations with the plaintiff, were:

1. The Department of Justice believed it was necessary to present one Federal position on the issues raised by the plaintiff,

2. The District Court might rule in plaintiff's favor and either set a "bad precedent", or leave the Departments of Energy (DOE) and Interior (DOI) with a ruling neither would find satisfactory to their interests,

3. The assumption that DOE would be amenable to amending 10 CFR 212.131 (the 60 day price certification

regulation) to 90 or 120 days or whatever was necessary to accommodate DOI's royalty oil program,

4. The assumption that DOI would decide to drop its administrative charge after a process of reconsidering its position of charging refiners for the cost of administering royalty oil sales,

5. The assumption that DOE and DOI would act promptly in amending 10 CFR 212.131 and dropping the administrative fee.

The Departments of the Interior and Energy may decide to stop charging refiners a fee to cover the costs of administering royalty oil sales. We have indicated our willingness to discuss the matter with Energy; however it would be some time before such a decision takes effect.

The amendment of 10 CFR 212.131 by DOE would facilitate the administration of this Department's royalty oil program. However, since the amendment would only have prospective application, the plaintiff in this case, as well as other refiners participating in our royalty oil program, could still file suit against us on the same issues raised in the subject suit, on our administration of other royalty oil contracts in the past. In short, amending 10 CFR 212.131 now would still leave us vulnerable to suits by refiners for our actions taken prior to the regulation's being amended. Thus, the amendment of 10 CFR 212.131, alone, does not remove the possibility of future litigation over the issue of this Department's compliance with that regulation as it presently reads. We believe several millions of dollars of claims by refiners, whose situations are the same as the plaintiff's in this case, may result if the case is settled in favor of Young Refining Corp.

For the reasons stated in this letter, we recommend against commencement of efforts to settle this litigation

until the Departments of the Interior and Energy have agreed on the principles involved.

Sincerely,

FREDERICK N. FERGUSON
Deputy Solicitor

cc:
Docket Section
Solicitor's RF (2)
Secretary's RF (2)
DER RF
DER RF CMIIL
LHoese

SOL:LHoese:hPElliott:ljj 10-30-78 z6325

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 16 1980

Note for Chuck Eddy

From: Pierce Elliott

Subject: Resolution of *Saber Refining*/
Royalty Oil Problem

On Tuesday, May 6, 1980 several of us from the Solicitor's Office met with the Solicitor-Designate to discuss resolution of the *Saber Refining* case and to discuss other problems arising from the USGS Royalty Oil Accounting System. We discussed a range of possible ways to resolve these interrelated problems:

1. *Saber Refining Co. v. Andrus*

a. Ask opposing counsel through Justice for time to allow USGS internally to resolve the problem.

b. Ask Department of Justice as a delaying tactic to adopt a position based on the Schafer-Krulitz memorandum that the Department of the Interior is not bound by the 60-day certification requirement.

c. Urge settlement of the *Saber Refining* case in order to take the immediate pressure off resolving the larger problem of overhauling the USGS Royalty Accounting System. (Counsel for *Saber Refining* have offered to postpone the hearing on the motion to dismiss in order to enter into settlement negotiations).

2. USGS Royalty Oil Accounting System

a. Congressional Assistance

i. Seek a legislative exemption from Department of Energy pricing/(and allocation?) regu-

lations. The Department of Navy was successful in obtaining an exemption from the Department of Energy regulations after the *Mohawk* case.

ii. Seek extra funding for sufficient staffing for current Royalty Oil Accounting System.

b. Urge USGS to bring field people who work with the royalty accounting system to find out if there is not some way to revise the system to avoid conflict with the Department of Energy's regulations.

c. Continue Current Accounting System, but assess payments on fair market value of oil and later adjust the billings downward to reflect the correct price for the oil consistent with Department of Energy pricing regulations.

d. Petition the Department of Energy's Office of Hearings and Appeals for an exemption from the 60-day certification requirement, seeking a 120-day certification period.

This summarizes the alternative courses of action which we discussed and considered to be feasible. It should be noted that none of the proposals are mutually exclusive; a number of the proposals may be utilized in resolving the problems that confront the Department of the Interior.

Meanwhile, subsequent discussions between the Department of Justice attorney who is handling the *Saber Refining* case and Douglas Fant of our office indicate that the Department of Justice will enter into settlement negotiations with Saber Refining. Saber has begun to collect its billings and will submit these to USGS for verification of overcharges. When these steps have been taken, it is possible that we could agree to settle with Saber.

Settling the one case, however, will not solve the underlying problem. It is clear that we cannot expect Justice to continue to defend USGS in future cases. We know already of several more that will soon be initiated. Thus, a solution to the basic accounting problem is badly needed.

We would like to discuss this with you at a meeting tentatively scheduled for 11 a.m., May 19.

cc:
Hillary Oden
Fred Ferguson
John Leshy
John Little
Larry McBride

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

No. MO-84-CA-05

TIPPERARY REFINING COMPANY

vs.

UNITED STATES DEPARTMENT OF INTERIOR

[Filed Oct. 9, 1985]

ORDER

The parties in the above-styled and numbered cause moved for partial disposition of this case through cross motions for summary judgment. Fed. R. Civ. P. 56. This Court heard oral arguments on the merits of the motions on January 29, 1985. Since that time, the Temporary Emergency Court of Appeals handed down its decision in *Lunday-Thagard Company v. United States Department of Interior*, No. 5-115 July 16, 1985. In that case, TECA held that the district court lacked jurisdiction over the claims raised under the Emegency Petroleum Allocation Act, 15 U.S.C. sec. 754 because Congress has not waived its sovereign immunity in that area. The Defendant in its motion contests this Court's jurisdiction over Plaintiff's claims. In accordance with *Lunday-Thagard*, the Court holds that the defendant is correct as to counts

one, two and four raised in Plaintiff's complaint. As such, the Court dismisses the claims in those counts without prejudice.

The remaining claim in Plaintiff's action is that involving transportation charges. TECA in *Lunday-Thagard* held that such a claim is not barred by the doctrine of sovereign immunity. There is a question, however, whether this Court is the proper forum to hear the claim concerning transportation charges. As such, the Court directs the parties to respond in writing within ten (10) days from the date of this Order addressing whether this claim can be heard by this Court or should be heard by the United States Court of Claims.

IT IS SO ORDERED.

SIGNED this 27th day of September, 1985.

/s/ David O. Belew, Jr.
DAVID O. BELEW, JR.
United States District Judge